

No. 11726

United States
Circuit Court of Appeals
For the Ninth Circuit.

A. J. GOERIG AND CLYDE PHILP,

Appellants,

vs.

CONTINENTAL CASUALTY COMPANY,
a Corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington.
Southern Division

NOV 28 1947

PAUL P. O'BRIEN

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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Attorneys for Continental Casualty Co.,
Defendant and Appellee.

In the United States District Court, Eastern District of Washington, Southern Division

No. 267

UNITED STATES OF AMERICA, for the use
and benefit of WALTON LUMBER COMPANY, a corporation,

Plaintiff,

vs.

SAM MACRI, JOE MACRI, and DON MACRI,
doing business under the assumed trade name
MACRI & COMPANY, and A. J. GOERIG
and CLYDE PHILIP, and THE CONTINENTAL
CASUALTY COMPANY, a corporation,

Defendants.

COMPLAINT

Comes Now the above named plaintiff and for its cause of action alleges as follows:

I.

That the Walton Lumber Company is now, and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Washington, and has paid its annual license fee due the State of Washington last past.

II.

That Macri and Company at all times herein mentioned was and now is a co-partnership composed of Sam Macri, Joe Macri and Don Macri; that A. J. Goerig and Clyde Philip were at all times herein mentioned members of a joint adventure, consisting of themselves, and the members of the co-partnership of Macri and Company.

III.

That the defendant, Continental Casualty Company, was at all times hereinafter mentioned and now is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana.

IV.

That at the instance and request of the co-partnership of Macri and Company and the joint adventure consisting of the defendants above named in Paragraph II of this Complaint, the Walton Lumber Company delivered lumber to the said defendants as follows:

January 27, 1945, Invoice No. 1742, Specification No. 1062, Sunnyside.....	\$605.89
February 10, 1945, Invoice No. 1798, Specification No. 1062, Sunnyside.....	314.08
February 24, 1945, Invoice No. 1865, Prosser.....	557.65
February 24, 1945, Invoice No. 1865A, Prosser.....	33.30
February 10, 1945, Invoice No. 1799, Prosser.....	65.10
March 17, 1945, Invoice No. 1949, Prosser.....	259.22
March 26, 1945, Invoice No. 1981, Prosser.....	362.90
March 24, 1945, Invoice No. 1981A, Prosser	23.64
April 28, 1945, Invoice No. 2129, Prosser.....	558.63
May 5, 1945, Invoice No. 2160, Prosser.....	241.50

That said lumber delivered was of a reasonable value of \$3021.91;

That the said defendants have failed and refused to pay for said lumber delivered, and that there is due and owing to the plaintiff, Walton Lumber Company, the sum of \$3021.91.

V.

That defendant, Macri and Company, a co-partnership composed of Sam Macri, Joe Macri and Don Macri, entered into a contract, the exact date being unknown, with the United States Government for certain work to be done in connection with Schedule No. 1, Specification No. 1062, Roza Division, Yakima Project, Washington, and in connection with said work furnished to the United States Government a payment bond issued by the Continental Casualty Company in the sum of \$65,000.00; that at about the same date the said defendant did enter into a contract with the United States Government under Schedule of Specifications No. 1068, Roza Division, Yakima Project, Washington, and did furnish a payment bond to the United States Government issued by the Continental Casualty Company in the sum of \$84,833.75; that the lumber furnished by the plaintiff, Walton Lumber Company, was furnished to the defendants in connection with both contracts jointly.

VI.

That the Continental Casualty Company did, on the 7th day of December, 1943, issue a payment

bond in the sum of \$65,000.00, conditioned that Macri and Company, a co-partnership composed of Sam Macri, Joe Macri and Don Macri, would protect all persons supplying labor and/or material in the prosecution of work provided in a contract entered into between the co-partnership and the United States Government for the construction of earth work, pipe lines, and other items, known as Schedule No. 1, Specifications No. 1062, Roza Division, Yakima Project, Washington.

VII.

That the Continental Casualty Company did, on the 18th day of May, 1943, issue a payment bond in the sum of \$84,833.75, conditioned that Macri and Company, a co-partnership composed of Sam Macri, Joe Macri and Don Macri, would protect all persons supplying labor and/or material in the prosecution of work provided under a contract entered into between the co-partnership and the United States Government for the construction of earth work, pipe lines, and other items, known as Schedule of Specifications No. 1068, Roza Division, Yakima Project, Washington.

VIII.

That more than ninety (90) days have elapsed since the plaintiff, Walton Lumber Company, furnished the material as set forth above and the defendants, a co-partnership and joint adventure, have failed to pay said obligation and the Conti-

mental Casualty Company is now liable on its bond for the payment of said material furnished in the sum of \$3021.91, said sum being due Walton Lumber Company.

IX.

That A. J. Goerig and Clyde Philip were at all times herein mentioned interested in the contracts above described and were members of a joint adventure consisting of the members of the co-partnership and themselves.

X.

That this action is brought under the provisions of the Miller Act (public Building Contracts) Aug. 24, 1935, c. 642, 49 Stat. 793, Code Title 40, Sections 270a-270d; that said Act provides that all actions instituted under the provisions thereof shall be brought in the name of the United States for the use of the person suing in the United States District Court, in the district in which the contract was executed and performed; that the contracts hereinabove sued upon were executed and performed under the jurisdiction of the above entitled court.

XI.

That less than one year has elapsed since the date of final settlement upon the above described contracts, being Schedule No. 1, Specifications No. 1062, Roza Division, Yakima Project, Washington, and Schedule of Specifications No. 1068, Roza Division, Yakima Project, Washington.

Wherefore, plaintiff prays that it be granted judgment against the defendants, Sam Macri, Joe Macri and Don Macri, doing business under the assumed trade name, Macri and Company, and A. J. Goering and Clyde Philip, and The Continental Casualty Company, a corporation, in the sum of \$3021.91, together with interest as allowed by law from date of delivery, and that said judgment be declared a lien against the funds held by the Continental Casualty Company, or due and owing by the Continental Casualty Company to the United States Government, or to others, in connection with the operations above set forth in the Complaint, together with costs of suit and reasonable attorneys' fees and for such other and further relief as the Court may deem proper.

COOPER & COOPER,
By /s/ LESLIE R. COOPER,
Attorneys for Plaintiff.

State of Washington,
County of Snohomish—ss.

J. H. Fletcher, being first duly sworn, on oath, deposes and says: That he is the Secretary of the Walton Lumber Company, a corporation, the plaintiff above named; that he is duly authorized to make this verification for and on behalf of said plaintiff; that he has read the above and foregoing Complaint, knows the contents thereof, and believes the same to be true.

/s/ J. H. FLETCHER.

Subscribed and Sworn to before me this 23rd day of April, 1946.

/s/ LESLIE R. COOPER,
Notary Public, in and for the State of Washington,
residing at Everett.

Filed April 24, 1946.

[Title of District Court and Cause.]

ANSWER AND CROSS-COMPLAINT

Comes Now A. J. Goerig and Clyde Philp erroneously pleading herein as Clyde Philip, and for answer in and to the Plaintiff's Complaint admit, deny and allege as follows:

1.

For answer to Paragraph One of Plaintiff's Complaint these answering Defendants deny each and every allegation contained in said Paragraph One.

2.

For answer to Paragraph Two of Plaintiff's Complaint these answering Defendants deny each and every allegation contained in said Paragraph Two.

3.

For answer to Paragraph Three of Plaintiff's Complaint these answering Defendants deny each and every allegation contained in said Paragraph Three.

4.

For answer to Paragraph Four of Plaintiff's Complaint these answering Defendants deny each and every allegation contained in said Paragraph Four.

5.

For answer to Paragraph Five of Plaintiff's Complaint these answering Defendants deny each and every allegation contained in said Paragraph Five.

6.

For answer to Paragraph Six of Plaintiff's complaint these answering Defendants deny each and every allegation contained in said Paragraph Six.

7.

For answer to Paragraph Seven of Plaintiff's complaint these answering Defendants deny each and every allegation contained in said Paragraph Seven.

8.

For answer to Paragraph Eight of Plaintiff's complaint these answering defendants deny each and every allegation contained in said Paragraph Eight.

9.

For answer to Paragraph Nine of Plaintiff's complaint these answering Defendants deny each and every allegation contained in said Paragraph Nine.

10.

For answer to Paragraph Ten of Plaintiff's complaint these answering Defendants deny each and every allegation contained in said Paragraph Ten.

11.

For answer to Paragraph Eleven of Plaintiff's complaint these answering Defendants deny each and every allegation contained in said Paragraph Eleven.

For a first and affirmative defense these answering Defendants allege.

1.

Any relationship existed between these answering Defendants and Sam Macri, Joe Macri and Don Macri has been terminated in by an agreement relieving these answering Defendants of any liability on the premises if any, which said agreement rests the entire responsibility for the matters contained in the Complaint upon Sam Macri, Joe Macri and Don Macri.

For Cross-Complaint against Defendants Sam Macri, Joe Macri and Don Macri, doing business under the assumed trade name Macri and Company, these answering Defendants alleges as follows:

1.

These answering Defendants and Sam Macri, Joe Macri and Don Macri entered into one certain agree-

ment whereby said Sam Macri, Joe Macri and Don Macri assumed all liability on account of all matters contained in said Complaint.

Wherefore, these answering Defendants pray that the Complaint be dismissed, and their costs and disbursements taxable by law; in the events that judgment be entered against these answering Defendants, these answering Defendants pray that they be given judgment over and against said Defendants.

BROWN & HAWKINS.

Filed May 14, 1946.

[Title of District Court and Cause.]

ANSWER AND CROSS-COMPLAINT

Comes now the defendant, Continental Casualty Company, a corporation, and in answer to plaintiff's complaint admits, denies and alleges as follows, to-wit:

First Defense

I.

This answering defendant admits Paragraphs I, II, III, V, VI, VII, IX and X of plaintiff's complaint and further alleges that all acts and things done by the co-partnership Macri & Company, were also done by said co-partnership Macri & Company for and on behalf of their joint adventurers A. J. Goerig and Clyde Philp.

II.

This answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth or veracity of the allegations contained in Paragraphs IV, VIII, and XI and therefore denies said paragraphs and each and every part thereof and specifically denies that this answering defendant is indebted to the plaintiff in the sum of \$3021.91 or any other sum whatsoever or at all.

Cross-Complaint

Comes now this answering defendant and for cross-complaint against Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers d/b/a Macri & Company and alleges as follows, to-wit:

I.

This cross-complaining defendant, Continental Casualty Company, realleges and makes a part hereof as though fully set forth at length Paragraphs I, II, III, V, VI, VII, IX and X of plaintiff's complaint.

II.

That in connection with the issuance of defendant Continental Casualty Company's payment bond above mentioned and as part of the consideration for the issuance thereof, the defendant Macri & Company for and on behalf of each of the defend-

ants above named as co-partners and joint adventurers did execute and sign an application directed to Continental Casualty Company for the purpose of procuring said payment bond. That among other things, said application for bond contains the following words and phrases, to-wit:

“Second. To indemnify the company against all loss, costs, damages, expenses and attorneys’ fees whatever and any and all liability therefor sustained or incurred by the company by reason of executing said bond or bonds or any of them; in making any investigation on account thereof; in prosecuting or defending any action brought in connection therewith; in obtaining release therefrom, and in enforcing any of the agreements herein contained.”

III.

That in the event use plaintiff in this case recovers judgment against Continental Casualty Company, then under the terms of said bond application and said bond, the said defendant, Continental Casualty Company, is entitled to and hereby demands judgment in an equal amount, plus costs and attorneys’ fees against each of the above named co-partners and joint adventurers and each of them jointly and severally.

Wherefore, having fully answered use plaintiff’s complaint, this defendant, Continental Casualty Company, prays that said complaint be dismissed and held for naught and further demands that in the event that judgment is rendered in favor of

use plaintiff against Continental Casualty Company, that it have and recover judgment in an equal amount, plus its costs and disbursements of this suit and a reasonable attorney's fee to be fixed by said Court, against each of the above named individual defendants doing business as Macri & Company, co-partners and joint adventurers, and each of them jointly and severally.

SKEEL, McKELVY. HENKE,
EVENSON & UHLMANN.

By WILLARD E. SKEEL.

United States of America,
State of Washington,
County of King—ss.

Warner M. Bruce, being first duly sworn, on oath deposes and says: That he is superintendent of Continental Casualty Company, a corporation, the defendant in the above entitled action; that he makes this verification for and on behalf of said corporation; that he is authorized so to do; that he has read the foregoing instrument, knows the contents thereof and believes the same to be true.

WARNER M. BRUCE.

Subscribed and sworn to before me this 1st day of May, 1946.

[Seal] K. VAN IORNS,
Notary Public in and for the State of Washington,
residing at Seattle.

Filed May 8, 1946.

[Title of District Court and Cause.]

REPLY OF A. J. GOERIG AND CLYDE
PHILIP TO ANSWER AND CROSS-COM-
PLAINT OF THE CONTINENTAL CASU-
ALTY COMPANY, A CORPORATION.

Comes Now the defendants A. J. Goerig and Clyde Philip and for reply to the Answer and Cross-Complaint of the defendants The Continental Casualty Company, admit, deny and alleges as follows:

1.

For reply to paragraphs I and II of said defendant The Continental Casualty Company, these replying defendants deny each and every allegation therein contained.

2.

For reply to paragraphs I, II and III of the cross-complaint of the defendant The Continental Casualty Company, these replying defendants deny each and every allegation therein contained.

Wherefore, having fully replied to the answer and cross-complaint of The Continental Casualty Company, these replying defendants A. J. Goerig and Clyde Philip pray that said cross-complaint be dismissed and held for naught and demand that judgment be entered in their favor for costs and disbursements taxable by law.

NAT U. BROWN,

KENNETH C. HAWKINS,

Attorneys for Defendants

A. J. Goerig and

Clyde Philip.

Filed July 5, 1946.

[Title of District Court and Cause.]

ORDER ON PRE-TRIAL

Pursuant to an oral order for pre-trial under Rule 16 of the Rules of Civil Procedure for the District Courts, this cause came on for hearing on the 7th day of January, 1947.

Leslie R. Cooper appearing as attorney for plaintiff;

Thomas Holman and A. T. Bateman appearing as attorneys for defendants Macri;

Nat U. Brown appearing as attorney for defendants Goerig and Philp;

Willard E. Skeel appearing as attorney for Continental Casualty Company;

It is stipulated that the following exhibits may be marked for identification and received in evidence at the trial without objection as to authenticity of the documents and signatures.

Plaintiff's Identification "A"—Certified copy of contract and bond as to Specification #1062.

Plaintiff's Identification "B"—Certified copy of contract and bond as to Specification #1068.

Defendant Casualty Company's Identification "1"—Application for contract bond on Specification #1062.

Defendant Casualty Company's Identification "2"—Application for contract bond on Specification #1068.

Defendants Macri Identification "1"—Joint venture agreement with Goerig and Philp on Specification #1062.

Defendants Macri Identification "2"—Joint venture agreement with Goerig and Philp on Specification #1068.

Defendants Goerig and Philp Identification "1"—Agreement terminating joint ventures.

Motion of Mr. Cooper to amend his pleadings by adding a prayer for interest granted.

It is further stipulated between all parties involved in this cause, that a judgment may be entered for the use plaintiff, Walton Lumber Company, in the amount of \$3021.91, comprised of \$919.97 against specification #1062, and \$2101.94 against specification #1068, the entry of such judgment to be made after determination of the respective rights of the defendants Macri, the defendants Philp and Goerig, and the defendant Continental Casualty Company under the pleadings and the issues as now framed, and subject also to the determination of whether or not the use plaintiff's claim for interest is valid.

It is further stipulated that there are no written agreements between the defendants Macri and defendants Goerig and Philp other than defendants Macri Identification "1" and "2" and defendants Goerig and Philp Identification "1" pertaining to Specifications #1062 and #1068.

It is further stipulated that the use plaintiff is a corporation and that its last annual license fees have been paid and it has a full right to sue.

It is further stipulated that the Continental Cas-

ualty Company is a corporation licensed to do business in the State of Washington and has paid its last and all other license fees.

It is further stipulated that at the time of entering the principal contracts, the defendants Sam Macri, Joe Macri and Don Macri were and are still co-partners doing business under the firm name and style of Macri & Company and are all residents of the City of Seattle in the Western District of Washington.

It is further stipulated that this cause be consolidated with causes numbered 250, 251, 255 and 257 for the trial of the remaining issues and be tried on February 19, 1947, at 10:00 a.m.

It Is Ordered and Adjudged that the above stipulations be and the same are hereby approved and made a part of the record in the above entitled cause.

Dated this 27th day of January, 1947.

SAM M. DRIVER,

United States District Judge.

Filed Jan. 27, 1947.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for trial in the above entitled cause before Hon. Judge Sam M. Driver on the 19th day of February, 1947, Leslie R. Cooper appearing for the plaintiff, and Tom W. Holman appearing as attorney for defendants Sam Macri, Joe Macri and Don Macri, and Nat U. Brown appearing as attorney for defendants A. J. Goerig and Clyde Philp, and Willard E. Skeel appearing as attorney for defendant Continental Casualty Company, a corporation, and the Court having heard all the evidence adduced and arguments of counsel, now, therefore, makes the following:

FINDINGS OF FACT

I.

That the Walton Lumber Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Washington, and has paid its annual license fee due the State of Washington last past.

II.

That Sam Macri, Joe Macri and Don Macri were and now are a co-partnership doing business under the firm and style of Macri and Company, and all are residents of the City of Seattle in the Western District of Washington.

III.

That A. J. Goerig and Clyde Philp had been members of a joint adventure consisting of themselves and the members of the co-partnership of Macri and Company.

IV.

That the defendant Continental Casualty Company was at all times hereinafter mentioned and now is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana.

V.

That at the special instance and request of the co-partnership of Macri and Company and the joint adventure consisting of Sam Macri, Joe Macri, Don Macri, A. J. Goerig and Clyde Philp, the Walton Lumber Company, a corporation, delivered lumber to the said defendants in connection with Schedule #1, Specification #1062 and #1068, Roza Division, Yakima Project, Washington:

January 27, 1945, Invoice #1742, Specification No. 1062, Sunnyside.....	\$605.89
February 10, 1945, Invoice #1798, Specification No. 1062, Sunnyside.....	314.08

Total deliveries of lumber under Specification #1062, date of last delivery February 10, 1945.....	\$ 919.97
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February 24, 1945, Invoice #1865, Specification No. 1068, Prosser.....	\$557.65
February 24, 1945, Invoice #1865A, Specification No. 1068, Prosser.....	33.30
February 10, 1945, Invoice #1799, Specification No. 1068, Prosser.....	65.10
March 17, 1945, Invoice #1949, Specification No. 1068, Prosser.....	259.22
March 26, 1945, Invoice #1981, Specification No. 1068, Prosser.....	362.90
March 24, 1945, Invoice #19181A, Specification No. 1068, Prosser.....	23.64
April 28, 1945, Invoice #2129, Specification No. 1068, Prosser.....	558.63
May 5, 1945, Invoice #2160, Specification No. 1068, Prosser.....	241.50

Total deliveries of lumber under Specification #1068, date of last delivery May 5, 1945	\$2,101.94
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That the said defendants have failed and refused to pay for said lumber delivered and there is now due and owing to the plaintiff, Walton Lumber Company, a corporation, the sum of \$919.97 with respect to Specification #1062 and the sum of \$2101.94 with respect to Specification #1068.

VI.

That the defendant Macri and Company, a co-partnership composed of Sam Macri, Joe Macri and Don Macri, entered into a contract, the exact date being unknown, with the United States Government for certain work to be done in connection with Schedule #1, Specification No. 1062, Roza Division, Yakima Project, Washington, and in connection with said work furnished to the United States Gov-

ernment a payment bond issued by the Continental Casualty Company in the sum of \$64,275.48; that at about the same date the said defendant did enter into a contract with the United States Government under Schedule of Specifications No. 1068, Roza Division, Yakima Project, Washington, and did furnish a payment bond to the United States Government issued by the Continental Casualty Company in the sum of \$84,833.75; that lumber as set forth in Paragraph V in the sum of \$2101.94 was furnished by the plaintiff, Walton Lumber Company, a corporation, in connection with Specification No. 1068, and lumber in the sum of \$919.97 was furnished in connection with Specification No. 1062.

VII.

That the Continental Casualty Company did, on the 7th day of December, 1943, issue a payment bond in the sum of \$64,275.48, conditioned that Macri and Company, a co-partnership composed of Sam Macri, Joe Macri and Don Macri, would protect all persons supplying labor and/or material in the prosecution of work provided in a contract entered into between the co-partnership and the United States Government for the construction of earth work, pipe lines, and other items, known as Schedule #1, Specifications #1062, Roza Division, Yakima Project, Washington.

VIII.

That the Continental Casualty Company did, on the 18th day of May, 1945, issue a payment bond in

the sum of \$84,833.75, conditioned that Macri and Company, a co-partnership composed of Sam Macri, Joe Macri and Don Macri, would protect all persons supplying labor and/or material in the prosecution of work provided under a contract entered into between the co-partnership and the United States Government for the construction of earth work, pipe lines, and other items, known as Schedule of Specifications #1068, Roza Division, Yakima Project, Washington.

IX.

That more than ninety (90) days have elapsed since the plaintiff, Walton Lumber Company, a corporation, furnished said lumber as set forth in Paragraph V to the defendants and that they have failed to pay said obligation and that the Continental Casualty Company is now liable on its bonds for payment of said materials furnished as follows:

Bond in connection with Specification

#1062 \$ 919.97

Bond in connection with Specification

#1068 \$2101.94

X.

That A. J. Goerig and Clyde Philp had been interested in the contracts above described and were members of a joint adventure consisting of the members of the co-partnership and themselves.

XI.

That this action is brought under the provisions of the Miller Act (public Building Contracts) Aug.

24, 1935, c. 642, 49 Stat. 793, Code Title 40, Sections 270a-279d; that said Act provides that all actions instituted under the provisions thereof shall be brought in the name of the United States for the use of the person suing in the United States District Court, in the district in which the contract was executed and performed; that the contracts hereinabove sued upon were executed and performed under the jurisdiction of the above entitled court.

XII.

That less than one year has elapsed since the date of final settlement upon the above described contracts, being Schedule #1, Specifications #1062, Roza Division, Yakima Project, Washington, and Schedule of Specifications #1068, Roza Division, Yakima Project, Washington.

XIII.

That in connection with the issuance of defendant Continental Casualty Company's payment bond, above referred to, and as part of the consideration for the issuance thereof, defendants Macri & Company for and on behalf of each of the defendants above named as co-partners and joint adventurers, to-wit: Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, did execute and sign an application directed to Continental Casualty Company for the purpose of procuring said payment bond. That among other things said application for bond contains the following words and phrases, to-wit:

“Second. To indemnify the company against all loss, costs, damages, expenses and attorneys’ fees whatever, and any and all liability therefor sustained or incurred by the company by reason of executing said bond or bonds or any of them; in making any investigation on account thereof; in prosecuting or defending any action brought in connection therewith; in obtaining release therefrom, and in enforcing any of the agreements herein contained.”

From the Foregoing Findings of Fact, the Court now makes the following

CONCLUSIONS OF LAW

I.

That the Walton Lumber Company, a corporation, is entitled to judgment in the amount of \$3021.91, with interest thereon at the rate of 6% per annum on \$919.97 of said sum, from February 10, 1945, and with interest thereon at the rate of 6% per annum on \$2101.94 of said sum from May 5, 1945, against the defendants Sam Macri, Joe Macri and Don Macri, co-partners doing business as Macri and Company, and Continental Casualty Company, an Indiana corporation, together with costs and disbursements herein incurred.

II.

Continental Casualty Company, an Indiana corporation, is entitled to judgment on its cross-complaint against the defendants, Sam Macri, Don Macri, Joe Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers, doing business

as Macri & Company, in the amount of \$3021.91 with interest thereon at the rate of 6 per cent per annum on \$919.97 of said sum from February 10, 1945, and with interest thereon at the rate of 6 per cent per annum on \$2101.94 of said sum from May 5, 1945, together with a reasonable attorney's fee in the amount of \$150 together with their costs and disbursements herein incurred.

III.

The defendants A. J. Goerig and Clyde Philp are entitled to a judgment of dismissal against the defendants Sam Macri, Joe Macri and Don Macri on the latters' cross-complaint against A. J. Goerig and Clyde Philp without costs.

IV.

The defendants Sam Macri, Joe Macri and Don Macri, are entitled to a judgment of dismissal against the defendants A. J. Goerig and Clyde Philp on the latters' cross-complaint against the Macris without costs.

Done in Open Court this 1st day of May, 1947.

SAM M. DRIVER,

United States District Judge.

Presented by:

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN.

By WILLARD E. SKEEL,
Attorneys for Continental
Casualty Company.

Filed May 1, 1947.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil Action No. 267

UNITED STATES OF AMERICA, for the use
and benefit of WALTON LUMBER COM-
PANY, a corporation,

Plaintiff,

vs.

SAM MACRI, JOE MACRI, and DON MACRI,
doing business under the assumed trade name
MACRI & COMPANY, and A. J. GOERIG
and CLYDE PHILP, and THE CONTINEN-
TAL CASUALTY COMPANY, a corporation,

Defendants.

JUDGMENT AND DECREE

The above entitled matter coming on for hearing in open court, the use plaintiff, Walton Lumber Company, appearing by and through its attorney, Leslie R. Cooper; the defendants Sam Macri, Joe Macri and Don Macri appearing by and through their attorneys, Brethorst, Holman, Fowler & Dewar, Tom W. Holman of counsel; the defendants Clyde Philp and A. J. Goerig appearing by and through their attorneys Brown & Hawkins, Kenneth C. Hawkins of counsel, and the defendant Continental Casualty Company appearing by and through

its attorneys, Skeel, McKelvy, Henke, Evenson and Uhlmann, Willard E. Skeel of counsel; and the court hearing evidence and being fully advised in the premises and having heretofore entered its Findings of Fact and Conclusions of Law;

It Is, Now, Here Ordered, Adjudged and Decreed that the Walton Lumber Company, a corporation, is hereby granted judgment in the sum of \$3021.91, together with interest thereon at the rate of 6% per annum on \$919.97, of said sum from the 10th day of February, 1945, and with interest thereon at the rate of 6% per annum on \$2101.94 of said sum from the 5th day of May, 1945, against the defendants Sam Macri, Joe Macri and Don Macri, a co-partnership doing business as Macri and Company, and the Continental Casualty Company, an Indiana corporation, together with its costs and disbursements as herein incurred, taxed at \$33.59, and use plaintiffs cause of action as against the defendants Clyde Philp and A. J. Goerig is dismissed without costs.

It Is Further Ordered, Adjudged and Decreed that Continental Casualty Company, an Indiana corporation, is hereby granted judgment against the defendants, Sam Macri, Don Macri, Joe Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers, doing business as Macri & Company, in the amount of \$3021.91 with interest thereon at the rate of 6 per cent per annum on \$919.97 of said sum from February 10, 1945, and with interest thereon at the rate of 6 per cent per annum on

\$2101.94 of said sum from May 5, 1945, together with a reasonable attorneys' fee in the amount of \$150.00 together with its costs and disbursements herein incurred, taxed at \$..... none.

It Is Further Ordered, Adjudged and Decreed that A. J. Goerig and Clyde Philp are granted a judgment of dismissal as against the defendants Sam Macri, Joe Macri and Don Macri on the latters' cross-complaint, without costs.

It Is Further Ordered, Adjudged and Decreed that the defendants Sam Macri, Joe Macri and Don Macri are granted a judgment of dismissal against the defendants A. J. Goerig and Clyde Philp on the latters' cross-complaint, without costs.

Done in Open Court this 1st day of May, 1947.

SAM M. DRIVER,

United States District Judge.

Presented by:

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

By WILLARD E. SKEEL,

Attorneys for Continental
Casualty Company.

Filed May 1, 1947.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now the defendants, A. J. Goerig and Clyde Philp and respectfully move the court for the entry of an order setting aside the judgment heretofore entered herein and entering judgment in the favor of these defendants or in the alternative granting these defendants a new trial upon the grounds and for the following reasons:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which the losing party was prevented from having a fair trial;

2. Misconduct of the prevailing party, his attorney or the jury;

3. Accident or surprise which ordinary prudence could not have guarded against;

4. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

5. Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

6. Insufficiency of the evidence to justify the verdict or decision;

7. Error in law occuring at the trial;

8. Where the right to procure a transcript of the testimony or proceedings has been lost without any fault or negligence on the part of the losing party.

The particular error relied upon by these defendants in moving for said new trial is the ruling and judgment of the court that the defendant, Continental Casualty Company is entitled to judgment over and against these defendants notwithstanding the plaintiff obtained no judgment against these defendants; that under the bond and application these defendants are obligated to indemnify the Continental Casualty Company only against liability for which these defendants are responsible.

The particular error relied upon by these defendants in moving for said new trial is the ruling of the court that the termination agreement did not absolve these defendants from all liabilities.

This motion is based upon the pleadings and papers on file herein, upon the evidence given at the trial, and upon the minutes of the court.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for Defendants

A. J. Goerig and

Clyde Philp.

Filed May 12, 1947.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

This matter having come on for argument on the 20th day of May, 1947, before the Hon. Sam M. Driver, United States District Judge, upon the motion of defendants, A. J. Goerig and Clyde Philp, for a new trial; and the Court having listened to argument and believing that the Court's original decision in this matter was correct that none of the grounds for defendants' motion for new trial exist or are well taken; and the Court being otherwise fully advised in the premises, it is

Now, Therefore,

Ordered, Adjudged and Decreed that the motion for new trial of defendants, A. J. Goerig and Clyde Philp, be and the same is hereby denied, to all of which said defendants, A. J. Goerig and Clyde Philp, except and their exception is allowed.

Done in Open Court this 20th day of May, 1947.

SAM M. DRIVER,
Judge.

Presented by:

WILLARD E. SKEEL.

Filed May 20, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that A. J. Goerig and Clyde Philp, two of the defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment and decree entered in the above entitled action on the 1st day of May, 1947, and from order denying A. J. Goerig and Clyde Philp's motion for new trial entered on the 20th day of May, 1947.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for Appellants

A. J. Goerig and

Clyde Philp.

Copies mailed to: Cooper & Cooper, 210 Colby Bldg., Everett, Washington; Skeel, McKelvy, Henke, Evenson & Uhlmann, Ins. Bldg., Seattle, Wash.; Brethorst, Holman, Fowler & Dewar, 17th Floor Hoge Bldg., Seattle, Wash., this 29th day of July, 1947.

A. A. LaFRAMBOISE,

Clerk.

By MARIE EALY,

Deputy.

Filed July 29, 1947.

[Title of District Court and Cause.]

APPELLANTS' A. J. GOERIG AND CLYDE
PHILP'S STATEMENT OF POINTS ON
APPEAL

I. The United States District Court was in error in entering judgment against Clyde Philp and A. J. Goerig in favor of the Continental Casualty Company for the following reasons:

1. Use plaintiff was awarded judgment in the principal sum of \$919.97 with respect to materials furnished on specification 1062 and \$2101.94 for materials furnished with respect to 1068. Goerig and Philp did not enter into any joint venture agreement with respect to 1068 and were not co-partners or co-adventurers of Macri & Company with respect to specification 1068, and were not therefore liable to indemnify or compensate the Continental Casualty Company for any moneys which it was required to pay on its bond with respect to specification 1068.

2. The materials furnished with respect to bond specification 1062 and 1068 were furnished and the obligation to pay for same arose subsequent to the termination agreement terminating the joint venture agreement.

3. Goerig and Philp did not sign and were not parties to the application for the bond or to the bond itself.

4. The Continental Casualty Company did not

rely on credit of Goerig and Philp and did not know they were connected with the Macri Company.

5. Goerig and Philp received no proceeds or benefits from the bond, nor did Macri & Company while Goerig and Philp were its silent "partners."

6. The "silent" partnership was terminated prior to affixing of liability on the bond.

7. Parties to a contract can modify or alter same—or rescind it—even though there be a creditor beneficiary, unless and until the creditor beneficiary has changed his position in reliance thereon.

8. A principal is not liable to a surety for an indebtedness that is not the obligation of the principal, even though, for some other reason the surety is liable to the creditor.

II. The United States District Court was in error in denying Goerig and Philp's motion for a new trial for the reasons specified in paragraph I hereof.

KENNETH C. HAWKINS,
NAT. U. BROWN,
Attorneys for Appellants
A. J. Goerig and
Clyde Philp.

Filed July 30, 1947.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That we, A. J. Goerig & Clyde Philp, the Defendants above named, as Principal, and the Manufacturers Casualty Insurance Company, a corporation organized under the laws of the State of Pennsylvania, and legally doing business in the State of Washington, as Surety, are held and firmly bound unto Sam Macri, Joe Macri & Don Macri, d/b/a Macri and Company, and the Continental Casualty Company & Walton Lumber Company, a corporation, in the just and full sum of Two Hundred Fifty Dollars (\$250.00), for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 24th day of July, 1947.

The Condition of This Obligation Is Such, That, Whereas, the above named Plaintiff, Walton Lumber Company, a Corporation, on the 1st day of May, 1947, in the above entitled action and Court, recovered judgment against the Defendants, Sam Macri, et al., & The Continental Casualty Company, above named for \$3021.91 with interest at 6% on \$919.97 of said sum from 2/10/45 and interest at 6% on \$2101.94 from 5/5/45, and the Continental Casualty Company recovered Judgment over against A. J. Goerig and Clyde Philp in said sums plus an attorneys fee in the sum of \$150.00.

And Whereas, The above named Principals have heretofore given due and proper notice that they appeal from said decision and judgment of said District Court to the Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, If the said Principals, A. J. Goerig & Clyde Philp, shall pay Walton Lumber Company, a Corporation, and Sam Macri, Joe Macri and Don Macri and the Continental Casualty Company all costs and damages that may be awarded against them on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00), then this obligation to be void; otherwise to remain in full force and effect.

[Seal] A. J. GOERIG,
 CLYDE PHILP,
 MANUFACTURERS
 CASUALTY INSURANCE
 COMPANY,
By A. A. NAEF,
 Attorney-in-Fact.

[Endorsed]: Filed July 29, 1947.

[Title of District Court and Cause.]

United States of America,
Eastern District of Washington—ss.

CLERK'S CERTIFICATE

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify the foregoing typewritten pages numbered 1 to 55, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings, in the above entitled cause, as are necessary to the hearing of the appeal therein as called for by the designation of the record on appeal filed by counsel for the Appellants, A. J. Goerig and Clyde Philp, as the same now remains on file and of record in my office, and that the same constitutes the record on appeal from the judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that included in this transcript of record on appeal is a copy of all exhibits designated by counsel for Appellants.

I further certify that the "memorandum decision of the Honorable Sam M. Driver dated March 27, 1947" as called for in the Supplemental Designation of the Appellee Continental Casualty Company, is not included in this record on appeal for the reason that no such document was signed or filed in this case.

I further certify that the fees of the Clerk of this Court for preparing and certifying the fore-

going typewritten record as called for in the Appellant's designation of record on appeal amount to \$9.50 and the same has been paid in full by Brown & Hawkins, attorneys for said Appellants.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima, Washington, in said district, this 28th day of August, 1947.

[Seal] A. A. LaFRAMBOISE,
Clerk of said District Court.
By /s/ THOMAS GRANGER,
Deputy.

[Testimony of A. J. Goerig and Clyde Philp is set forth on pages 20 to 39. Stipulated portions of exhibits as called for in designation are set out on pages 58 to 114 of companion cause No. 11722.]

[Endorsed]: No. 11726. United States Circuit Court of Appeals for the Ninth Circuit. A. J. Goerig and Clyde Philp, Appellants, vs. Continental Casualty Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed September 2, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

[Adoption of Points on Appeal is set forth on page 115 of companion cause No. 11722.]

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated by and between Counsel for the respective parties on appeal herein that the above entitled cause may be consolidated for the purpose of printing the record herein and for the purpose of printing the briefs herein and for the purpose of argument.

It is further agreed and stipulated that the Clerk in preparing the printed transcript of the record shall print one (1) only of the following matters previously designated in each of the above captioned cases in the designation and contents of record on appeal:

Testimony of A. J. Goerig.

Testimony of Clyde Philp.

Plaintiff's Exhibit "A"—contract and bond with respect to specification 1062.

Plaintiff's Exhibit "B"—contract and bond with respect to specification 1068.

Plaintiff Continental Casualty Company's Exhibit "1"—application for bond with respect to specification 1062.

Plaintiff Continental Casualty Company's Exhibit "2"—application for bond with respect to specification 1068.

Defendant Macri's Exhibit "1"—Joint venture agreement with respect to specification 1062.

Defendants Macri's Exhibit "2"—joint venture agreement with respect to specification 1068.

Defendants Goerig and Philp's Exhibit "1"—termination agreement.

It is further stipulated that the Clerk in directing the printing of the transcript shall print all of the matters specified in each of the designations in all of the above captioned cases, but shall cause the same to be printed only once and shall eliminate any duplicate printing.

Dated this 17th day of September, 1947.

/s/ NAT U. BROWN,

/s/ KENNETH C. HAWKINS,

Attorneys for Appellants
Goerig and Philp.

SKEEL, McKELVY, HENKE,

EVENSON & UHLMANN,

By /s/ WILLARD E. SKEEL,

Attorneys for Appellee
Continental Casualty Company.

[Endorsed]: Filed Sept. 22, 1947.

